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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 544

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

KEYSTONE STEEL & WIRE COMPANY AND INDEPENDENT STEEL WORKERS ALLIANCE

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered on April 2, 1946, setting aside and refusing to enforce an order issued against Keystone Steel & Wire Company.

**OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (B. A. 208–220)[1] is reported at 155 F. 2d 553. The findings

[1] The record in this Court consists of the appendices to the briefs in the court below (herein designated as "P. A." for petitioner's appendix and "B. A." for Board's appendix), with the addition of the proceedings in the court below, which have been inserted at the end of the Board's appendix and are herein designated also as "B. A." Occasional references to the typewritten transcript of the proceedings before the Board, on file with this Court, are designated as "Tr."

of fact, conclusions of law, and order of the National Labor Relations Board are reported at 62 N. L. R. B. 683.

**JURISDICTION**

The decree of the Circuit Court of Appeals was entered on April 2, 1946 (B. A. 220). The Board's petition for rehearing was denied June 27, 1946 (B. A. 222). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

**QUESTIONS PRESENTED**

1. Whether, where one labor organization immediately succeeds in point of time a concededly employer-dominated labor organization, takes over its treasury, has a constitution patterned after its constitution, is organized by its governing body and has in large part the same officers, it is for the Board or for the courts to determine upon all the circumstances if there was a sufficient line of cleavage between the two groups so that the second organization may not be ordered disestablished.

2. Whether, in the light of the record, the court below was justified in holding, on the basis of its own independent appraisal of the evidence, that there was no substantial support for the Board's findings that the respondent had violated Section 8 (1) and (2) of the Act.

3. Whether the court below was justified in setting aside and refusing to enforce the portion of the Board's order requiring respondent to rescind its rule

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against solicitation on company property insofar as it applied to the employees' non-working hours, where the court had held that the rule was invalid insofar as it prevented union solicitation during non-working hours.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are set forth in the Appendix, *infra*, p. 24.

## STATEMENT

Upon usual proceedings, the Board issued its findings of fact, conclusions of law, and order (P. A. 98–135). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1a]

Prior to the enactment of the National Labor Relations Act, the Keystone Steel & Wire Company (herein called the Company) suggested the formation and interfered with the administration of the Keystone Employees Association (herein called the K. E. A.), an organization typical of the company-dominated representation plans extensively adopted by employers following the passage of the National Industrial Recovery Act in 1933 (P. A. 102–104, 115; B. A. 1–13, 38–40, 62–64, Bd. Exh. 11). From the enactment of the Act in 1935 until April 1937, the Company participated in its administration and contributed financial and other support to the K. E. A. (P. A. 104, 115; B. A. 7, 14–17, 22–23, 32–33, 74–75,

[1a] References preceding the semicolons are to the Board's findings; those following refer to the supporting evidence.

79–80, 83–85, 104–105, P. A. 230, 305–314, 319, Bd. Exhs. 125–131, 134).

A few days after the Supreme Court on April 12, 1937, upheld the constitutionality of the Wagner Act,[2] the Company's vice-president called into his office the officers of the K. E. A. and some of its employee representatives and informed them that the Company would no longer recognize the K. E. A. since the Act rendered it illegal. He gave no assurances, however, that the Company would thereafter pursue a policy of strict neutrality towards the organizational activity of its employees (P. A. 105, 117–118; B. A. 40–41, 113, 125, 153–154, P. A. 195–196, 220–222, 319–320, Bd. Exh. 117). Save for this limited announcement to the K. E. A. officials, the Company gave no publicity to its repudiation of the illegal K. E. A.; nor did it undertake in any manner to notify its 1,400 employees of any change in the relationship of the Company and the K. E. A., or to assure its employees of the Company's future neutrality in labor matters (P. A. 105, 117; B. A. 41, 66, 83, 86, 98, 105, 113, 125, 127, 149, 150, 152–153, Tr. 3121, 3169, 3205). Nor were such assurances conveyed to the employees through the K. E. A. officers or representatives (P. A. 118; B. A. 98, 150–153, 156–163).

Upon learning of the Company's decision, the K. E. A. General Committee held a meeting in the plant and decided to abandon the K. E. A. and to

[2] *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, and companion cases.

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form another unaffiliated labor organization under the name of the Independent Steel Workers Alliance (herein called the Alliance) (P. A. 105, 115; B. A. 17, 19–20, 24–27, 34–37, 156, 159–160, P. A. 184–185, 196–197). The same employees who were then the officers and committeemen of the K. E. A. constituted themselves the Organizing Committee of the Alliance and immediately began a widespread membership campaign in the plant during working hours, which they conducted without objection by the Company (P. A. 105, 115; B. A. 17, 20–21, 27, 36, 37, 39, 41, 65–66, 69, 72–73, 78, 80, 85–86, 98–100, 105–106, 120, P. A. 197, 214, Tr. 1140).

These employees, who had been prominently identified with the company-dominated K. E. A., guided and controlled the Alliance during its formative stages (P. A. 106–107, 115; B. A. 27–30, 129–131, 136–140, P. A. 330–332, 415–416, 418, 427–428, 587–589, 592–596). On April 16, 1937, they met and appointed a committee to prepare a constitution and by-laws for the Alliance (P. A. 106, 116; B. A. 36, P. A. 330–331, 415–416, 427–428). On April 21, 1937, the Organizing Committee held another meeting, at which were appointed as temporary officers of the Alliance the same persons who had served as the last officers of the K. E. A. (P. A. 106, 115–116; B. A. 21, 27, P. A. 331–332, 587). At this meeting the Organizing Committee also adopted the Alliance constitution and by-laws, which had been drafted by the previously designated committee (P. A. 106, 116; P. A. 330–332, 418–419, 427–428, 589). These

documents were strikingly similar to those of the K. E. A. both in substantive aspects and details of language, except for the elimination of the provisions for managerial participation and support (P. A. 106–107, 116; P. A. 488–495, 497–498, 501–506, 509, 512–513). Shortly thereafter the former K. E. A. officers and committeemen, acting as the temporary General Committee of the Alliance, directed the transfer of the funds of the K. E. A.[3] into the bank account of the Alliance (P. A. 108, 16; P. A. 188–190, 193–194).

On April 28, 1937, a week after the adoption of the constitution by the Organizing Committee and within two weeks after the Alliance movement first began, the Company granted the Alliance exclusive recognition, without any attempt to verify its claimed majority status (P. A. 107–108, 116; P. A.

[3] At least a portion of these funds had been contributed by the Company's support and assistance of the K. E. A. In August, 1935, the Company had furnished materials for a ball field and grandstand, which were built by the K. E. A. on company property, and thenceforth the Company had permitted the K. E. A. without any payments to the Company to use these facilities and to charge admissions to K. E. A.-sponsored games (P. A. 104; B. A. 8–10, 15–16, P. A. 305–314). The Company had granted the confectionery concession at the ball park to an employee on the condition he remit 40 per cent of the profits to the K. E. A. (P. A. 104; B. A. 9–10, 16–17, 22–23). In addition the Company had permitted the K. E. A. to raise funds during working hours by selling tickets for dances and other events (P. A. 104; B. A. 7–8, 67–69). All funds of the K. E. A. had been deposited in its account in a local bank, the entire balance of which was transferred to the Alliance (P. A. 104, 108, 116; B. A. 8–9, P. A. 188, 555, Bd. Exh. 26).

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226–227, 473–474). In May, 1937, the same persons who had been acting as its temporary officers and had served as officers of the K. E. A. immediately prior to its abandonment, were elected permanent officers of the Alliance (P. A. 108, 116; B. A. 27, P. A. 186–187, 191–193, 292–293, 300, 587, 596).

The Company interfered with the administration of the Alliance and gave it support by permitting various supervisory employees who were management representatives to join the Alliance and remain members of it, several of whom still retained their memberships at the time the Board held its hearing in the case in June 1944 (P. A. 108–110, 118–120; B. A. 140–149, P. A. 227–228, 257, 450–451, 576–577, 578–579, 727–729).

From 1937 through 1942 the Company and the Alliance held various bargaining conferences and reached agreement on numerous matters, but not until after the United Farm Equipment & Metal Workers of America, C. I. O. (herein called the Union), appeared at the plant were these agreements embodied in a written contract [4] (P. A. 110, 116; B. A. 196, P. A. 355, 365–367, Int. Exh. 1, pp. 45, 151).

When the status of the Alliance was first challenged in 1942 by the advent of the Union in the plant, the

[4] However, in December 1940 the Company issued a Statement of Policy, which specifically provided for unilateral changes therein by the Company at any time (P. A. 110; B. A. 131–132, P. A. 354, 542–552, Int. Exh. 1, pp. 125, 151).

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Alliance intensified its organizational activities at the plant, and the Company gave support to the measures adopted by the Alliance and took steps to suppress the activities of the Union. The Company denied the Union the same organizing privileges which it had accorded the Alliance and discriminatorily invoked and enforced its hitherto dormant no-solicitation rule (P. A. 110–112, 118–119; B. A. 41–42, 43–45, 47–54, 66–69, 73–74, 80–82, 89, 96, 101–104, 106–109, 118, 186, 188, 190–191, P. A. 209–210, 240–241, 550, 585, 586). Forceful warnings were given those known to be active Union supporters (P. A. 111, 119; B. A. 43–45, 82, 88–90, 96, 186, 188, 190–191, P. A. 586), and one such employee, although later reinstated, was actually discharged for an alleged violation of the rule (P. A. 111, 119; B. A. 47–54, P. A. 251–252, 585). In marked contrast, Alliance members engaged in open solicitation in the plant, frequently during working hours, during the same period, and no such drastic action was taken against any of them (P. A. 118–119; B. A. 41–42, 66–69, 73–74, 80–82, 89, 106–109, 118, P. A. 209–210, 240–241).

In various other ways the Company made known its preference for the Alliance over the Union. Supervisory employees made disparaging and belittling remarks about the Union (P. A. 113–114, 120; B. A. 56–57, 75–77, 81, 93–95, 114–117), foremen were permitted to retain their memberships in the Alliance (P. A. 109, 120; B. A. 148–149, P. A. 450–451, 576–577, 729), and the Company gathered

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and furnished to the Alliance various bits of information which were calculated to assist it (P. A. 112–113, 120; B. A. 192–194). Shortly after rejecting the Union's request for collective bargaining on the ground that it was not accompanied by proof of majority, the Company, aware of the intense competing activities of the Union and the Alliance and despite the conflicting claims of the two organizations, firmly entrenched the Alliance and gave it an advantage over the Union by executing a written exclusive bargaining agreement with it, in a departure from its previous policy (P. A. 114–115, 120–121; B. A. 206, P. A. 557–571, Int. Exh. 1, pp. 218, 219, Tr. 109).

Upon these facts the Board found that the Alliance existed as a continuation of the illegal K. E. A. and inherited the K. E. A.'s illegality since it grew out of the K. E. A. without any line of fracture or break in continuity (P. A. 115). The Board found that by reason of the circumstances under which the Alliance arose,[5] the employees could reasonably conclude that the Alliance had evolved from the K. E. A. and that, as its successor, it was the recipient of the Company's continued favor (P. A. 116). The Board re-

[5] The Board noted particularly, in this connection, the formation of the Alliance at the meeting which dissolved the K. E. A., the leadership of the Alliance by the old K. E. A. officials, the Company's acquiescence in the use of the Company facilities for the membership campaign, the similarity of the constitutions of the organizations, the transfer of K. E. A. funds to the account of the Alliance, and the precipitant recognition granted the Alliance by the Company (P. A. 115–116).

jected the Company's contention that it had satisfied its obligation under the Act to disestablish the K. E. A. by notifying the K. E. A. officers and committeemen of its withdrawal of recognition from the K. E. A. The Board stated that not only had the Company's conduct fallen short of the action required to disabuse the employees of the impression that the Alliance had the same favor and support which had accompanied the K. E. A. but that the Company's failure to give all its employees notice of the disestablishment of the K. E. A., when viewed in the light of the circumstances under which the Alliance was formed, served to confirm the impression that the Alliance was merely a continuation of the K. E. A. (P. A. 117–118). The Board further held that whatever appearance of neutrality might have arisen from the abandonment of the K. E. A. was promptly dissipated by the support and encouragement given the Alliance in its formative stages by the Company's acquiescence in the use of Company time for its organizational activities, the hasty recognition granted it, and the inclusion of the supervisory employees in the membership rolls (P. A. 118).

The Board further found that even disregarding the factors which rendered the Alliance a successor to the K. E. A., the Company violated Section 8 (2) and (1) of the Act by giving support and assistance to the Alliance in its campaign against the Union (P. A. 118–121). In this connection the Board stated that the sudden enforcement of the hitherto unused no-solicitation rule had the necessary effect

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of impeding the employees in the exercise of their right to transfer their allegiance to the Union, thereby assisting the Alliance in maintaining its status (P. A. 119). The Board found that the Company had rendered further valuable assistance to the Alliance by the close cooperation between the Company and the Alliance, by the hostile remarks of the foremen directed against the Union, by the acquiescence of the Company in the membership of its supervisors in the Alliance, and by the execution of the written contract with the Alliance for the purpose of forestalling the Union (P. A. 119–121). The Board found that "the present existence of the Alliance and its continued recognition constitute a continuing obstacle to the exercise by the employees of the rights guaranteed them under the Act" (P. A. 129).

The Board also found that the Company had violated Section 8 (1) of the Act by its promulgation of the no-solicitation rule, by its discriminatory enforcement of the rule, and by the execution of the contract with the Alliance (P. A. 122–123).

On the basis of these findings the Board ordered the Company to cease and desist from its unfair labor practices, to withdraw all recognition from and completely disestablish the Alliance, and to refrain from recognizing the K. E. A. should it return to active existence, to rescind the rule against solicitation insofar as it extended to the employees' non-working hours, and to post appropriate notices (P. A. 132–133).

Thereafter the Company and the Alliance filed a joint petition in the court below to review and in part[6] set aside the Board's order (P. A. 135–150); the Board answered requesting enforcement of the order (P. A. 150–155).[6a] The court, Judge Kerner dissenting, denied the Board's request for enforcement and vacated the Board's order, on the ground that the Board's findings were not supported by substantial evidence (B. A. 208–220). The Board's petition for rehearing was denied, without opinion, on June 27, 1946 (B. A. 222).

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[6] The Board had ordered dismissed that part of the complaint which had alleged that the Company had discriminated against nine employees in violation of Section 8 (3) of the Act (P. A. 123–129, 133), and no review was sought of that portion of the Board's order.

[6a] While this case was pending in the court below the Board conducted elections among certain of the employees of the Company (for the direction of election see 65 N. L. R. B. 274). These elections resulted in the certification on February 28, 1946, of an A. F. of L. union for one of the crafts theretofore covered by the Alliance contract (see P. A. 558–559 for the unit covered by this contract) but in no certification for the other employees. These subsequent elections are not part of the record and cannot properly be considered in reviewing the order in this case. Furthermore, even if they could be, the decisions of this Court demonstrate that they would not have altered the result. *National Labor Relations Board* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 249–250, 251. Cf. *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 59; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 659, affirmed *per curiam*, 312 U. S. 660.

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REASONS FOR GRANTING THE WRIT

I

In cases where the Board finds, as it did in the instant case, that a labor organization "grew out of" a prior dominated organization "without any line of fracture or break in continuity" (P. A. 115), the Board has taken the position that the employer must disestablish not only the first but also the second labor organization. This doctrine has received general approval by the circuit courts of appeals,[7] other than the court below. That court has set aside Board disestablishment orders in seven cases, in addition to the instant case, where the Board relied

[7] *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 660–661 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660; *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 926 (C. C. A. 2); *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 887 (C. C. A. 2); *National Labor Relations Board* v. *Landis Tool Co.*, 145 F. 2d 152, 157 (C. C. A. 3); *Western Electric Co.* v. *National Labor Relations Board*, 147 F. 2d 519, 524 (C. C. A. 4), certiorari denied, 324 U. S. 870; *National Labor Relations Board* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 266 (C. C. A. 6); *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. 2d 363, 367–368 (C. C. A. 6); *National Labor Relations Board* v. *Rath Packing Co.*, 123 F. 2d 684, 685 (C. C. A. 8); *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 115 F. 2d 1007, 1011 (C. C. A. 10); *National Labor Relations Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. 2d 419, 424 (C. C. A. 10); *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120, 123 (C. C. A. 10); *Wilson & Co.* v. *National Labor Relations Board*, 18 L. R. R. M. 2198 (C. C. A. 10).

on the fact that the second labor organization grew out of a prior dominated organization as one of the bases of its order.[8] In the instant case while the court indicated its disagreement with this doctrine by stating that "even the old organization," which admittedly had been dominated by the employer, could still serve as bargaining agent "if selected and if, in good faith it has substantially complied with the Act" (B. A. 214), the court placed its decision on the ground that the first organization had been adequately disestablished and that the second was a new organization free of any connection with the first (B. A. 211–212, 214–215).

In substituting its judgment for that of the Board as to whether the first organization was adequately disestablished and whether the second was truly new, the court below acted in a manner which conflicts with the decisions of the Circuit Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits. These courts have held that the determination of whether one labor organization is an illegal successor to a prior organization is peculiarly a

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[8] *National Labor Relations Board* v. *Falk Corp.*, 102 F. 2d 383, reversed, 308 U. S. 453; *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. 2d 506, reversed, 311 U. S. 584; *Foote Bros. Gear and Machine Corp.* v. *National Labor Relations Board*, 114 F. 2d 611, reversed and remanded, 311 U. S. 620, Board order again set aside, 121 F. 2d 802; *Staley Mfg. Co.* v. *National Labor Relations Board*, 117 F. 2d 868; *National Labor Relations Board* v. *Gutmann & Co.*, 121 F. 2d 756; *Commonwealth Edison Co.* v. *National Labor Relations Board*, 135 F. 2d 891; *National Labor Relations Board* v. *Duncan Foundry & Machine Works*, 142 F. 2d 594.

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matter for the Board to determine.[9] In the *Standard Oil* case, the Circuit Court of Appeals for the Second Circuit stated (138 F. 2d 885, at p. 887):

> We need not say whether on this showing we should have come to the Board's conclusion that * * *, four and a half years after the "Association" was formed, and at a time when there can be no doubt that a very great majority of the employees still adhered to it, their adherence [to the new group] was a consequence of some carry-over of the [employer's] earlier favor of the "Plan," and its well known preference for it over an alliance with any national union. We understand the law to be that *the decision of the Board upon that issue is for all practical purposes not open to us at all;* certainly not after we have once decided that there was "substantial" evidence that the "disestablished" union was immediately preceded by a period during which there was a "dominated" union. * * * these relations [of an employer with his employees] appear to fall into more or less uniform models or patterns, which put those well skilled in the subject at an advantage which no bench of judges can hope to rival. [Italics supplied.]

[9] *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 660–661 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660; *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 926, 927–928 (C. C. A. 2); *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 886, 888 (C. C. A. 2); *National Labor Relations Board* v. *Landis Tool Company*, 145 F. 2d 152, 157 (C. C. A. 3); *Western Electric Co.* v. *National Labor Relations Board*, 147 F. 2d 519, 524 (C. C. A. 4); *National Labor Relations Board* v. *Mt. Clemens Pottery Company*, 147 F. 2d 262, 266 (C. C. A. 6).

Similarly in the *Westinghouse* case, *supra*, which presented the situation of a patently illegal organization followed by an "independent" group which had been organized and sponsored by the representatives of the old group, the court held that it was for the Board to determine what steps were necessary to make public the cleavage between the two groups. The court stated that although it was "possible that it would have made no difference [in the employees' minds] if the company had declared itself to" the employees at large as the plant manager had done to the representatives alone, "the Board was to decide how important that would have been; certainly it is not a question for us" (112 F. 2d, at p. 661). The court there held that where the employees had not been advised generally of the company's neutrality and where they might reasonably believe that the new union had evolved from the old, the Board might take it as datum that the employees' choice of the new had not been as free as the Act demands.

In the *Sperry Gyroscope* case, *supra*, 129 F. 2d at p. 927, the Second Circuit stated that whether the "'presumption' of the continuance of * * * domination * * * was overcome by [the company's action] was an issue of fact" to be decided by the Board upon all the circumstances of the case. The court stated that the central factor in making such a determination was the state of mind of the employees, an issue over which a court's powers of review are "especially narrow", and that a reviewing court

should defer to the Board's expert judgment in this regard.

The decisions of other circuit courts of appeals show a similar approach to the problem of the successor union. The Third Circuit Court of Appeals in the *Landis Tool* case, under circumstances very similar to the instant case, held that it was not for the court to set aside the Board's finding that the second union was an illegal successor of the dominated union because the first had not been properly disestablished, stating, the "conclusion of continuation of the effects of an employer-dominated beginning is a permissible one for the Board to draw" (145 F. 2d, at p. 157) and not one to be set aside because the court would have come to a different conclusion upon the same set of facts. See also *Western Electric Co.* v. *National Labor Relations Board, supra;* and *National Labor Relations Board* v. *Mt. Clemens Pottery Company, supra.*

The determinations of the Board with which the court below specifically disagreed show how far the court intruded itself into a field which the other circuit courts of appeals recognize has been left to the Board, in the absence of an abuse of discretion. Thus, the court below brushed aside the Board's finding that the respondent had never publicly disestablished the K. E. A. (P. A. 105, 116) by pointing to the testimony of the Union president that thirty or forty-five days after the K. E. A. was dissolved the employees generally knew it (B. A. 215). But the

crucial dates were the two weeks after dissolution during which the employees signed up for the Alliance and the respondent recognized it (see pp. 4–6, *supra*). The Board had before it the testimony of numerous witnesses that at the time they signed the Alliance card they did not know of the dissolution of the K. E. A.; that, as one employee put it, the card was just something else their K. E. A. representative asked them to sign (B. A. 98, 152, 153, 156, 157, 158, 159, 160, 161, 162, 163). Admittedly the respondent never made any public statement to its employees respecting the dissolution of the K. E. A. but depended upon the officers and representatives of the K. E. A. to pass on this information by informal word of mouth to the other employees (B. A. 66, 125, 127, 150, 157; P. A. 207, 272; Tr. 1881). Whatever passing on of the information did occur, either took place simultaneously with, or subsequent to, the organization of the Alliance (B. A. 125–127, 150, 155; P. A. 207, 272; Tr. 1881).

The court brushed aside the Board's finding that the K. E. A. treasury was transferred by the K. E. A. committee men from themselves as K. E. A. officers to themselves as the Alliance organizing committee (P. A. 108, 116), by assuming that the money transferred was a baseball fund and by stating that this transfer was made at the request of the ball players (B. A. 213). The Board found and there is no dispute in the record that it was the treasury of the K. E. A. which was transferred (P. A. 108; P. A. 188–190, 194, 555). Although one of the sources of

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the K. E. A.'s funds was the receipts from the ball park which respondent owned, these funds were not kept segregated (P. A. 108; B. A. 7–11, 14–17, 22–23, P. A. 305–314). Not only did the Board, as was its province as trier of the facts, disbelieve the testimony that the ball players directed the transfer (P. A. 108; P. A. 188–190, 194–195), but it pointed out that in any event the transfer of the money to the Alliance was evidence of the continuity between the K. E. A. and the Alliance (P. A. 108, 116).

The court below brushed aside the Board's finding that the K. E. A. General Committee decided to form the Alliance at the same meeting at which it decided to abandon the K. E. A. (P. A. 105, 115), by stating that at the meeting there was merely "some discussion of a new organization but no action was taken" (B. A. 211).

The court below brushed aside the Board's finding that the K. E. A. General Committee constituted itself the organizing committee of the Alliance and constituted the K. E. A.'s chief officers, temporarily the chief officers of the Alliance (P. A. 106, 115–116), by characterizing the finding as "of no importance in determining the question of domination" (B. A. 215).

Each of the foregoing items, relied on by the Board to show that the K. E. A. was not completely disestablished but continued in the form of the Alliance, was peculiarly for the Board to appraise, as the other circuit courts of appeals in the cases cited have repeatedly held.

Not only is the court below at odds with the other

circuits in its approach to the successor union cases, but we believe that its method of handling such cases fails to follow injunctions of this Court. In *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 60, this Court held:

> * * * the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board. Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference.

See also *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588, 598–600; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660.

## II

The court below did not offer any explanation for its refusal to enforce the provisions of the Board's order which required respondent to cease and desist from dominating or interfering with the administration of K. E. A. and to refrain from recognizing K. E. A. in the event that organization returns to existence (P. A. 132–133). The court pointed out respondent's concession that it had dominated and interfered with the formation and administration of the K. E. A. and contributed financial support to it (B. A. 213). The court may have felt that the abandonment of the K. E. A. made the Board's order unnecessary. But apparent lack of necessity for a

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Board order does not warrant a court in setting it aside. This Court has held in an analogous situation that the fact the employer is dealing with another union does not warrant a court in refusing to enforce an order requiring disestablishment of a prior labor organization. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. Under these circumstances there can be no possible basis for refusal to enforce these portions of the order.

## III

The Board also desires to present for this Court's consideration the question of the failure of the court below to follow the decision of this Court in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793.

The Board found that the Company had "discriminatorily invoked and enforced its no-solicitation rule so as to impede the Union's campaign and to assist the Alliance in maintaining its status" (P. A. 119). The Board further found that, disregarding its discriminatory application, the rule was, *per se*, violative of the Act insofar as it prohibited union solicitation by employees on company property during non-working time.[10]

The Board expressed the theory upon which it found the rule violative of the Act (P. A. 119):

[10] The Board found (P. A. 119), "there [was] no showing that the rule prohibiting union solicitation during non-working hours was necessary in order to maintain production or preserve discipline at the plant."

> This unlawful prohibition in the rule is a recognized impediment to self-organization and * * * handicapped the Union, which was trying to gain a foothold in the plant, more than it did the Alliance, the established and recognized bargaining agent. Thus the very existence of this illegal rule had the necessary effect of impeding the employees in the exercise of their right to transfer their allegiance from the Alliance to the Union and thereby constituted further assistance to the Alliance. Moreover, it appears that the Union's campaign, in fact, was suppressed to some degree by the actual application of the rule to union adherents who were soliciting in the plant during lunch and other non-working periods.

Although the opinion below recognizes that the "rule was invalid insofar as it prevented union solicitation during non-working hours" (B. A. 216), the court refused to enforce that part of the Board's order requiring the company to rescind the invalid portion of the rule (P. A. 133), apparently on the theory that "the rule was enforced * * * against everyone regardless of his union membership" (B. A. 216).

Entirely aside from the fact that the record clearly discloses that the rule was actually enforced discriminatorily (*supra*, pp. 7–8), the portion of the Board's order dealing with the rule should have been enforced in the light of the decision of this Court in the *Republic Aviation* case, *supra*.

In the *Republic Aviation* case, this Court had before it a rule similar to that in the instant case, and

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enforced the Board's order requiring rescission of "the rule against solicitation in so far as it prohibits union activity and solicitation on company property during the employees' own time" (324 U. S., at pp. 796, 805).

We believe that the Board's decision in the instant case meets all the requirements laid down by this Court in the *Republic Aviation* case, and that the court below clearly failed to follow the *Republic Aviation* case in setting aside that portion of the Board's order requiring the Company to rescind the no-solicitation rule insofar as it extended to non-working hours.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1946.